SUPREME COURT, U. S.

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IN THE

SUPREME COURT of the UNITED STATES

OCTOBER TERM, 1975

No. 75-1387

MONONGAHELA APPLIANCE COMPANY,
A WEST VIRGINIA CORPORATION,
PETITIONER

VS.

COMMUNITY BANK AND TRUST, N.A.,
A NATIONAL BANKING ASSOCIATION,
RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT.

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VS.

COMMUNITY BANK AND TRUST, N.A.,
A NATIONAL BANKING ASSOCIATION,
RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT.

Monongahela Appliance Company petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit entered January 2, 1976.

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OPINIONS BELOW

The single paragraph Per Curiam opinion of the United States Court of Appeals for the Fourth Circuit, appearing, Infra, Appendix A, Pages 1a and 2a, rendered January 2, 1976, is not yet reported. The opinion of the United States District Court for the Northern District of West Virginia, appearing, Infra, Appendix B, Pages 3a et sequitur, rendered May 2, 1975, is reported in 393 F. Supp. 1226.

JURISDICTION

The jurisdiction of this Court is invoked under Section 1254, Title 28 of the United States Code. The jurisdiction of the District Court was based on Section 1331, Title 28 of the United States Code.

QUESTIONS PRESENTED

This is a usury penalty action under Revised Statute 5198, 12 U.S.C. 86, and involves the rate of interest chargeable by a national bank to a corporate borrower under Revised Statute 5197, 12 U.S.C. 85. The question as to what rate of interest "**fixing**" or "**allowing**" potentials under the latter statute are possessed by a state statute denying the defense of usury to corporate borrowers has never been decided by this Court. But, supported only by a basically arbitrary decision of the United States Court of Appeals for the Second Circuit insecurely predicated upon the case law of the State of New York, the Comptroller's Manual For National Banks, Section 7.7310, in pertinent part, provides:

> "A national bank located in a state the law of which denies the defense of usury to a corporate borrower may charge a corporate borrower any rate of interest agreed upon by such borrower."

Implicit, if not explicit, in this pronouncement is the fallacy that a state statute denying the defense of usury to a corporate borrower is a law of the state by which the rate of interest is "**fixed**," and a law of the state by which interest is "**allowed**," at any rate agreed upon by a corporate borrower, within the meaning of the federal interest statute, Revised Statute 5197, 12 U.S.C. 85, quoted Infra. The United States Court of Appeals for the Second Circuit and the Comptroller both have permitted the ascribed Congressional purpose of insuring equality of competition as between state and national banks to override all other recognized rules of statutory construction, both in relation to the federal interest statute and the state statutes denying the defense of usury to corporate borrowers. In the instant case, the United States Court of Appeals for the Fourth Circuit applied and implemented the same fallacy. The questions presented are:

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1. Does West Virginia Code, 47-6-10, the West Virginia statute denying the defense of usury to corporate borrowers, constitute a law of the state by which the rate of interest is "**fixed**", and a law of the state by which interest is "**allowed**", at any rate agreed upon by corporate borrowers, within the meaning of the words "**fixed**" and "**allowed**" of the federal interest statute, Revised Statute 5197, 12 U.S.C. 85?

2. Does the fact that the courts of last resort of many of the states, having state statutes similar to West Virginia Code, 47-6-10, denying the defense of usury to corporate borrowers, hold that such statutes not only deprive corporate borrowers of the defensive shield but, also, deprive them of the offensive sword render such state statutes rate of interest "**fixing**" and "**allowing**" state laws, within the meaning of the federal interest statute, Revised Statute 5197, 12 U.S.C. 85?

3. Does the ascribed Congressional purpose in enacting the federal interest statute, Revised Statute 5197, 12 U.S.C. 85, of insuring equality of competition as between state and national banks transcend and override all other recognized rules of statutory construction, regardless of the manifest inadequacy of the language of the statute to effectuate the ascribed Congressional purpose?

4. Since usury is universally defined as the exaction by a lender of an unlawful rate of interest, if, as held by the New York courts, state statutes denying the defense of usury to corporate borrowers render lawful any rate of interest agreed upon by such borrowers, there is no usury, what construction is to be placed on the literal language of such statutes unequivocally but incongruously denying the defense of usury to corporate borrowers?

STATUTES INVOLVED

The Federal Rate of Interest Statute, Revised Statute 5197, 12 U.S.C. 85

"Any association may take, receive, reserve and charge on any loan or discount made, or upon any notes, bills or exchange, or other evidences of debt, interest at the rate allowed by the laws of the State, Territory, or District where the bank is located, or at a rate of 1 per centum in excess of the discount rate on ninety-day commercial paper in effect at the Federal reserve bank in the Federal reserve district where the bank is located, whichever may be the greater, and no more, except that where by laws of any State a different rate is limited for banks organized under State laws, the rate so limited shall be allowed for associations organized or existing in any such State under this chapter. When no rate is fixed by the laws of the State, or Territory, or District, the bank may take, receive, reserve, or charge a rate not exceeding 7 per centum, or 1 per centum in excess of the discount rate on ninety-day commercial paper in effect at the Federal reserve bank in the Federal reserve district where the bank is located, whichever may be the greater, and such interest may be taken in advance, reckoning the days for which the note, bill or other evidence of debt has to run. The maximum amount of interest or discount to be charged at a branch of an association located outside of the States of the United States and the District of Columbia shall be at the rate allowed by the laws of the country, territory, dependency, province, dominion, insular possession, or other political subdivision where the branch is located. And the purchase, discount, or sale of a bona fide bill of exchange, payable at another place than the place of such purchase, discount, or sale, at not more than the current rate of exchange for sight drafts in addition to the interest, shall not be considered as taking or receiving a greater rate of interest. R.S. Section 5197; June 16, 1933,

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c. 89, Section 25, Stat. 191; Aug. 23, 1935, c: 614, Section 314, 49 Stat. 711."

The Federal Usury Statute,
Revised Statute 5198, 12 U.S.C. 86

"The taking, receiving, reserving, or charging a rate of interest greater than is allowed by the preceding section, when knowingly done, shall be deemed a forfeiture of the entire interest which the note, bill, or other evidence of debt carries with it, or which has been agreed to be paid thereon. In case the greater rate of interest has been paid, the person by whom it has been paid, or his legal representatives, may recover back, in an action in the nature of an action of debt, twice the amount of the interest thus paid from the association taking or receiving the same: Provided, That such action is commenced within two years from the time the usurious transaction occurred. R.S. Section 5198."

The West Virginia Rate of Interest Statute In Effect on December 30, 1972, Chapter 6 of West Virginia Acts of Second Extraordinary Session of 1968, Not Appearing In The West Virginia Code

"Except in cases where it is otherwise specially provided by law, legal interest shall continue to be at the rate of six dollars upon one hundred dollars for a year and proportionately for a greater or less sum, or for a longer or shorter time, and no person upon any contract other than a contract in writing shall take for the loan or forbearance of money, or other thing, above the value of such rate: **Provided**, That a charge of one dollar may be made for any loan or forbearance of money or other thing, where the interest at the rate aforesaid would not amount to that sum, and the same shall not be a usurious charge or rate of interest.

"Parties may contract in writing after the effective date of this section for the payment of interest for the loan or forbearance of money at a rate not to exceed eight dollars upon

one hundred dollars for a year, and proportionately for a greater or less sum, or for a longer or shorter time, including points expressed as a percentage of the loan divided by the number of years of the loan contract. For the purpose of this section the term points is defined as the amount of money, or other consideration, received by the lender, from whatever source, as a consideration for making the loan and not otherwise expressly permitted by statute. Notwithstanding the foregoing provisions of this paragraph, if the interest charge on an installment loan made by a banking institution is deducted in advance as permitted by section twenty, article four, chapter thirty-one of this code, such interest charge shall not exceed the six percent per annum maximum provided for in such section."

The West Virginia Rate of Interest Statute On Installment Loans In Effect on December 30, 1972, Chapter 79 of West Virginia Acts of 1969, Not Appearing In The West Virginia Code

"After the effective date of this section parties may contract for and charge for a secured or unsecured loan, repayable in installments, not in excess of six percent per annum upon the face amount of the instrument or instruments evidencing the obligation to repay the loan, for the entire period of the loan and deduct such charge in advance or add the same to the principal amount of the loan: **Provided, however**, That if the entire unpaid balance outstanding on the loan is paid on any installment date, prior to maturity, the lender shall make a refund or rebate of such charge in an amount computed on the aggregate installments not due, at the original contract rate of charge; and any note evidencing any such installment loan may provide that the entire unpaid balance thereof at the option of the holder shall become due and payable upon default in the payment of any stipulated installment without impairing the negotiability of such note,

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if otherwise negotiable: **Provided further**, That nothing herein contained shall affect or restrict the right of parties under section five of this article to contract in writing for the payment of interest for the loan or forbearance of money at a rate not to exceed eight dollars upon one hundred dollars a year, and proportionately for a greater or less sum, or for a longer or shorter time, including points expressed as a percentage of the loan divided by the number of years of the loan contract: **And provided further**, That nothing herein contained in said section five of this article shall be taken or construed as authorizing any charge or charges of any kind or character, including interest, on installment loans by the deduction thereof in advance or by adding the same to the principal amount of the loan which singularly or together shall exceed the six percent maximum provided for in this section."

The West Virginia Substantive Usury Statute, West Virginia Code, 47-6-6, As Amended in 1968

"All contracts and assurances made directly or indirectly for the loan or forbearance of money or other thing at a greater rate of interest than is permitted by law shall be void as to all interest provided for in any such contract or assurance, and the borrower or debtor may, in addition, recover from the original lender or creditor or other holder not in due course an amount equal to four times all interest agreed to be paid and in any event a minimum of one hundred dollars. Every usurious contract and assurance shall be presumed to have been wilfully made by the lender or creditor, but a bona fide error, innocently made, which causes such contract or assurance to be usurious shall not constitute a violation of this section if the lender or creditor shall rectify the error within fifteen days after receiving notice thereof. (Code 1849, c. 141, Section 5; Code 1860, c. 141, Section 5; Code 1868, c. 96, Section 5; Code 1923, c. 96, Section 5; 1968, 2nd Ex. Sess., c. 7.)"

A West Virginia Procedural Usury Statute, West Virginia Code, 47-6-10, Denying The Defense of Usury To Corporations

"No corporation shall interpose the defense of usury in any suit or proceeding at law or in chancery, nor shall any bond, note, debt, or contract of a corporation be set aside, impaired, or adjudged invalid by reason of anything contained in the laws prohibiting usury, (1855-6, c. 96, Section 1; Code 1860, c. 57, Section 38; 1863, c. 83, Section 63; Code 1868, c. 52, Section 22; Code 1923, c. 52, Section 22.)"

Other West Virginia Procedural Usury Statutes

Other West Virginia procedural usury statutes believed to have no bearing on the instant case are West Virginia Code, 47-6-7; 47-6-8; and 47-6-9. Out of an abundance of caution, these procedural usury statutes are included and quoted in Appendix C.

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STATEMENT

The facts are not in dispute. The questions presented are pure questions of law involving the proper construction and application of the federal rate of interest statute, Revised Statute 5197, 12 U.S.C. 85, and the West Virginia procedural usury statute, West Virginia Code, 47-6-10. The facts and the procedural development of the case are adequately and accurately stated in opinion of the District Court, Appendix B, Pages 4a to 7a. It appears therefrom that, pursuant to a Business Loan Agreement, the corporate borrower from the national bank was required to maintain a demand deposit of $100,000.00 out of the borrowed principal sum of $950,000.00 with its participating bank and that the national bank required the payment of interest at the maximum numerical rate on the entire principal sum of $950,000.00. The District Court treated respondent's motion to dismiss as a motion for summary judgment and dismissed petitioner's action.

This petition seeks review of the decision of the United States Court of Appeals for the Fourth Circuit affirming the District Court decision denying the petitioning corporation's right to a recovery of $268,427.46, (twice the amount of $134,213.73 interest paid), in a usury penalty action under Revised Statute 5198, 12 U.S.C. 86, inferentially upon the theory that West Virginia Code, 47-6-10, denying the defense of usury to a porporation, is a law of the state by which the rate of interest is "**fixed**," and, therefore, a law of the state by which interest is "**allowed**," at any rate agreed upon by a corporate borrower, within the meaning of the words "**fixed**" and "**allowed**" of the federal rate of interest statute applicable to national banks, Revised Statute 5197, 12 U.S.C. 85.

There is no decision of this Court so holding, or sanctioning any such theory. There are only two decisions of this Court having any direct bearing on this subject, **Tiffany v.**

The National Bank of the State of Missouri, (1873), 85 U.S. (18 Wall.) 409; and **Daggs v. Phoenix National Bank**, (1900), 177 U.S. 549. In **Tiffany**, this Court, dealing with a Missouri statute which allowed a greater rate of interest to lenders generally than was allowed to state banks, held that Revised Statute 5197, 12 U.S.C. 85, entitled the naional bank to charge such greater rate of interest even though it gave advantages to national banks over their state competitors. In **Daggs**, this Court, dealing with a territorial law of Arizona which permitted the parties to agree in writing upon the payment of any rate of interest whatever, held that the words of the federal statute "**fixed by the laws**" must be construed to mean "**allowed by the laws**" and "**not a rate expressed in the laws.**" A recent exemplar of the quoted principle is **First National Bank in Mena v Nowlin**, 509 F. 2d 872, (Eighth Circuit 1975), where it is held that the phrase of the federal interest statute "**rate allowed by the laws of the State**" encompasses "**the entire case law of the state interpreting the state's limitations on usury**," and not merely "**the numerical rate adopted by the statute.**"

A third decision of this Court, **Evans v. National Bank of Savannah**, (1919), 251 U.S. 108, Headnote 1, holds that the National Bank Act establishes a system of general regulations, adopting the usury laws of the states only in so far as they severally fix the rate of interest.

There are two previous decisions of the United States Court of Appeals, one from the Ninth Circuit and the other from the Second Circuit, bearing upon this subject, **Hiatt v. San Francisco National Bank**, 361 F. 2d 504, (Ninth Circuit 1966); and **McNellis v. Merchants National Bank and Trust Company**, 390 F. 2d 239, (Second Circuit 1968). In **Hiatt**, the Court, dealing with a California constitutional provision fixing maximum interest rates but exempting banks created and operating under and pursuant to any laws of California or of the United States, held that the laws of California, and,

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therefore, the federal rate of interest statute, "**allowed**" any rate of interest agreed upon by the parties—the analogy between the California statutory situation and that of the Arizona statutory situation dealt with in **Daggs** being stressed and relied upon. In **McNellis**, the Court was dealing with an entirely different New York statutory situation from those existing in Missouri dealt with in **Tiffany**; in Arizona dealt with in **Daggs**; and in California dealt with in **Hiatt**. New York had no interest "**allowing**" statute in any degree similar to those of Missouri, Arizona and California which, being unambiguous, had to be applied—not construed. New York had a statute similar to West Virginia Code, 47-6-10, denying the defense of usury to corporate borrowers. **McNellis** is defensible if at all, and defensible only in New York, because the "**case law**" of the State of New York, (Cf. **First National Bank in Mena, Supra**), had construed the New York statute as a state law rendering lawful any rate of interest agreed upon by a corporate borrower.

This places the instant case in a class by itself. West Virginia, unlike Missouri, has no interest fixing statute sanctioning the rate of interest charged, as in **Tiffany**. West Virginia, unlike Arizona, has no interest statute fixing the rate of interest at whatever rate may be agreed upon in writing by the parties, as in **Daggs**. West Virginia, unlike California, has no constitutional provison exempting state and national banks from compliance with the prohibition against interest in excess of a specified maximum, as in **Hiatt**. Finally, West Virginia, unlike New York, has no "**case law**," (Cf. **First National Bank in Mena**, Supra), construing the statute denying the defense of usury to a corporate borrower as a state law rendering lawful any rate of interest agreed upon by a corporate borrower, as in **McNellis**.

The statutes with which the courts dealt in **Tiffany**, **Daggs** and **Hiatt** were all unambiguous interest allowing statutes not requiring construction—and, therefore, had to be

applied. In **Daggs**, Mr. Justice McKenna, in the Opinion, (177 U.S. 549, at 555), eliminated what ever semblance of ambiguity there may have been in the federal rate of interest statute. Most obviously, the New York statute denying the defense of usury to a corporate borrower, dealt with in **McNellis**, required not application but construction to make it a state law rendering lawful any rate of interest agreed upon by a corporate borrower, but the "**case law**" of New York so construed the New York statute, and the United States Court of Appeals for the Second Circuit, in **McNellis**, accepted and applied the construction placed on the New York statute by the case law of the State of New York—as it no doubt was obliged to do. The circumstance that the New York courts ignored and by-passed substantially all the applicable and recognized rules of statutory construction in placing this construction upon the New York statute did not present a federal question requiring the attention of he United States Court of Appeals for the Second Circuit in **McNellis.**

But, in the instant case, in the total absence of any West Virginia "**case law**" construing West Virginia Code, 47-6-10, denying the defense of usury to a corporate borrower, as a state law rendering lawful any rate of interest agreed upon by a corporate borrower, it became the imperative duty, successively, of the District Court and of the United States Court of Appeals for the Fourth Circuit to place such construction on this statute as would have been placed thereon by the Supreme Court of Appeals of West Virginia. In discharging this imperative duty, these courts were bound by the same rules of statutory construction as would have governed the court of last resort of the State of West Virginia. But without even mentioning any of the applicable rules of statutory construction, the District Court, in its opinion, asserts as its "**unassailable conclusion**" that the Supreme Court of Appeals of West Virginia would hold that the statute not only deprives a corporate borrower of a defensive shield but of an offensive sword, as well, and then proceeds, inferentially but only

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tacitly, to conclude that the statute is a state law rendering lawful any rate of interest agreed upon by a corporate borrower. It is not doubted that, in West Virginia, this procedural statute would be held to deprive a corporate borrower of both shield and sword, but the District Court's "**inferential and tacit**" conclusion therefrom is not only not "**unassailable**" but is a totally indefensible non-sequitur because the unequivocal and unambiguous language of the statute, tested by the applicable rules of statutory construction, places it in the category of a purely procedural statute possessing no substantive functions. The single paragraph Per Curiam opinion of the United States Court of Appeals for the Fourth Circuit merely adopts the opinion of the District Court.

Since the case law of the State of New York had construed the procedural New York usury statute as also performing a substantive interest allowing function, the United States Court of Appeals for the Second Circuit, in **McNellis**, was neither obliged nor permitted to challenge the method by which the New York Courts reached such construction, whether in accord with, or in disregard of, the applicable rules of statutory construction. But, here, in the instant case, in which the federal courts are obliged to construe the West Virginia procedural usury statute as would the court of last resort of West Virginia, such courts are obliged to observe and follow the rules of statutory construction. Manifestly, this was not done by either the District Court, in the first instance, or by the United States Court of Appeals for the Fourth Circuit, on appeal. What the courts below failed to do can be done only by this Court following the grant of the herein sought writ of certiorari.

REASONS FOR GRANTING THE WRIT

I.

The Holding of the Court of Appeals for the Fourth Circuit that West Virginia Code, 47-6-10, Procedurally Denying the Defense of Usury to Corporate Borrowers, Constitutes a Law of the State by which the Rate of Interest is Substantively "Fixed," and a Law of the State by which Interest is Substantively "Allowed," at any Rate Agreed Upon by Corporate Borrowers Within the Meaning of the Words "Fixed" and "Allowed" of the Federal Interest Statute, Revised Statute 5197, 12 U.S.C. 85, Not Based Upon Any West Virginia Case Law Construction or the Application of Recognized Rules of Statutory Construction, Presents a New and Far Reaching Question of Federal Law Which Has Not Been, But Should Be, Settled by this Court—Not by the Comptroller.

Under the immediately preceding division of this petition entitled Statement, we have cited and discussed the pertinent previous decisions of this Court and of the United States Court of Appeals for the Eighth Circuit, the Ninth Circuit and the Second Circuit. From such discussion, it is believed to be apparent that this is a case of first impression, although it was not recognized as such, or at least not treated as such, in the courts below. The failure of the courts below to so recognize or treat this case affords the most plausible explanation for the reversible error in their respective opinions. Both the District Court and the Court of Appeals for the Fourth Circuit treated the instant case as being of a kind with **McNellis v. Merchants National Bank and Trust Company**, 390 F. 2d 239, (Second Circuit 1968). Of course, it is not. In **McNellis**, the corporate plaintiff's first cause of action for a usury penalty under 12 U.S.C. 86 was denied, the Court, Opinion at Page 251, holding:

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> As to the first cause of action, the trustee and the banks agree on the substance of the relevant law but not its application. The New York law of usury is controlling as to national bank, Merchants, because 12 U.S.C. Section 85 so provides. Under New York law, the maximum rate of interest that generally may be charged is six percent per year. See N.Y. General Obligations Law, McKinney's Consol. Laws, c. 24-A, Section 5-501. A specific statute regulating New York State banks has the same limitation. N.Y. Banking Law, McKinney's Consol. Laws, c. 2, Section 108. Nevertheless, for many years corporations in New York have been barred from claiming usury. The General Obligations Law Section 5-521 now provides: "No corporation shall hereafter interpose the defense of usury in any action."

The quoted statement is brief rather than didactic. However, the case law of the State of New York supplied what the Court omitted. See **Butterworth v. O'Brien**, (1858), 23 N.Y. 275, and the New York cases cited in **In Re International Raw Material Corporation**, 22 F. 2d 920, at 923, (Second Circuit 1927), which hold the New York procedural usury statute to not only deprive corporate borrowers of both the defensive shield and the offensive sword but to perform the substantive function of rendering lawful any rate of interest agreed upon by a corporate borrower.

In the courts below, opposing counsel took the untenable position that, by the adoption of West Virginia Code, 47-6-10, similar in its language to that of the earlier New York statute, West Virginia adopted the case law of New York construing its similar statute. Here, chronology is important. The earlier similar New York statute was passed in 1850. The Virginia Assembly employed similar language in passing what is now West Virginia Code, 47-6-10, in 1855. **Butterworth**, the leading New York case, was not decided until 1858. The West

Virginia statute came to us not from New York but from Virginia as a part of what had been the statute law of the undivided state before the Separation. The law, of course, is that a statute adopted from another state will be presumed to have been adopted with the construction **previously** placed on it by the courts of that state. **Henreitta Mining & Milling Co. v. Gardner**, 173 U.S. 123; and 82 C.J.S. 860, Statutes, Section 372.

This Court has before it, either for application or construction, which ever may be required, the federal interest rate statute, Revised Statute 5197, 12 U.S.C. 85, and the West Virginia Procedural Usury Statute, West Virginia Code, 47-6-10. In petitioner's view, neither statute is ambiguous, and, therefore, both statutes must be applied, not construed. Of course, the application or construction of the federal statute is governed by federal rules, while the application or construction of the West Virginia statute is governed by West Virginia rules. However, these rules are not essentially divergent and they will be considered together.

In **Osaka Shosen Kaisha Line v. United States**, (1936), 300 U.S. 98, Headnote 2, this Court held:

> "Where the words of a statute are plain, there is no room for construction even where the statute is highly penal and therefore to be construed strictly."

See, also, the discussion by Mr. Justice Sutherland in the Opinion at Page 101 and the cases there cited. In **United States v. Hill**, 1918), 248 U.S. 420, at 424, this Court said:

> "The meaning of the act must be found in the language in which it is expressed, when, as here, there is no ambiguity in the terms of the law."

In **62 Cases of Jam v. United States**, (1950), 340 U.S. 593, Headnote 2 holds:

> "In construing an act of Congress it is for the

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court to ascertain the purpose of the legislation—neither to add nor subtract, neither to delete nor to distort."

In the Opinion at Page 596, Mr. Justice Frankfurter said:

"After all, Congress expresses its purpose by words. It is for us to ascertain—neither to add nor to subtract, neither to delete nor to distort."

In **United States v. Cooper Corporation**, (1940), 312 U.S. 600, Headnote 4, this Court held:

"It is not the function of a court to ingraft on a statute additions which it thinks the Legislature logically might or should have made."

In **A. Magnano Company v. Hamilton**, (1933), 292 U.S. 40, Headnote 11, this Court held:

"In determining whether a statute is in truth a taxing act or was intended to be something else, it must be construed, and the legislative intent ascertained, from the language of the act, and the words used therein are to be given their ordinary meaning unless the context shows that they are differently used."

In **DeRuiz v. DeRuiz**, (1936), 88 F. 2d 752, at 753, (U.S. Court of Appeals for D.C., 1936), it was held:

"While it is the duty of the courts in interpreting legislation to ascertain, if possible, the intent of the Legislature, we must not overlook the general rule of statutory construction that such intent is to be found in the language employed. **United States v. Golden-**

> **berg**, 168 U.S. 95, 103, 18 S. Ct. 3, 42 L. Ed. 394. When the words used are plain, they give meaning to the act, and it is neither the duty nor the privilege of the courts to enter speculative fields in search for a different meaning. **Caminetti v. United States**, 242 U.S. 470, 490, 37 S. Ct. 192, 61 L. Ed. 442."

Finally, in **Ganay v. Lederer**, (1918), 250 U.S. 376, at 381, Mr. Justice Day said:

> "Unless the contrary appears, statutory words are presumed to be used in their ordinary and usual sense, and with the meaning commonly attributable to them."

Nothing can be found in any of these federal rules of statutory construction to warrant, but there is an abundance to forbid, the action of any court in ingrafting upon, or reading into, the federal interest statute a proviso that in states having statutes denying the defense of usury to corporate borrowers the rate of interest shall be treated as "**fixed**" at what ever rate may be agreed upon by such corporate borrowers—yet these rules provided no deterrent to the Comptroller.

In **Missouri, Kansas & Texas Trust Company v. Krumseig**, (1898), 172 U.S. 351, at 359, this Court held:

> "The local law, consisting of the applicable statutes, as construed by the Supreme Court of the State, furnishes the rule of decision."

In **Winkle v. Scott**, 99 F. 2d 299, (Eighth Circuit, 1938), Syl. 1 and Opinion at Page 301, holds:

> "Whether notes executed by an Illinois corporation by its president in Illinois and payable in Illinois

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were usurious had to be determined by the laws of Illinois."

See, also, **Scudder v. Union National Bank of Chicago**, (1875), 91 U.S. 406, Headnote 1. In **Maynard v. General Electric Company**, 250 F. Supp. 949, (S.D. of W. Va., 1972), in the Opinion at 951, Chief District Judge Christy said:

> "It is conceded by both parties to this litigation that the question of whether or not lack of privity will defeat a breach of warranty claim under West Virginia law has not yet been decided by West Virginia's highest court. A federal district court's duty, under such circumstances, is to examine all state statutory and decisional law having a bearing on the subject and to then make an informed prediction of what the state's highest court would decide if the case were before it. **James v. United States**, 467 F. 2d 832 (4th Cir., 1972); **Panagopoulous v. Martin**, 295 F. Supp. 220 (S.D. W. Va. 1969). In no event may a federal judge allow himself the luxury of deciding the case in accordance with what he thinks the state law should be or how it ought to be changed."

As previously stated, the rules of statutory construction binding the West Virginia and Virginia courts in the application and constructon of state statutes are not essentially different from those governing the federal courts in applying and construing federal statutes. In **State v. Garner**, (1963), 148 W. Va. 92, at 95, 133 S.E. 2d 82, at 85, it is held:

> "It is elementary in the rules of statutory construction that where the language of a statute is free from ambiguity, its plain meaning is to be accepted without resort to interpretation."

Holding that it is elementary that it is the function of the

courts to interpret and apply the Acts of the Legislature as written and not to rewrite or correct them, the Supreme Court of Appeals of Virginia, in **Carter v. Nelms**, (1963), 204 Va. 338, 131 S.E. 2d 401, at 406, went on to hold:

> "The question here is not what the legislature intended to enact, but what is the meaning of that which it did enact. **We must determine the legislative intent by what the statute says and not by what we think it should have said.**"

In **Kinsey v. Kinsey**, (1958), 143 W. Va. 575, at 580, 103 S.E. 2d 409, at 413, it was held:

> "Where the legislative language is free from ambiguity, the plain meaning must be accepted by the courts without resort to the rules of interpretation or construction. Nor is it within the power of a court to create an ambiguity in a statute, where none exists, for the purpose of reading into it, by means of interpretation or construction, a meaning which is refuted by the clear language of the statute itself."

In **State v. Bragg**, (1968), 142 W. Va. 372, at 379, 163 S.E. 2d 685, at 689, the Court, **dealing with a statute like the instant statute of ancient origin**, held:

> "We are of the opinion that the provisions of Code, 42-1-7, are clear and unambiguous. The language of the statute has remained unchanged since the earliest days of our state's existence. It was not altered or qualified as a consequence of the careful scrutiny and prolonged study of our state's statutes which culminated in the adoption of the revised official Code of 1931. We are not at liberty, therefore, to read into the statute any limitations or qualifications not in

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any sense expressed in its language or to assume that the legislature intended the statute to have any meaning other than that which is clearly expressed therein."

In **Crockett v. Andrews**, (1970), 153 W. Va. 714, at 718, 172 S.E. 2d 384, at 387, it is held:

> "It has been declared that courts may not find ambiguity in statutory language which laymen are readily able to comprehend; nor is it permissible to create an obscurity or uncertainty in a statute by reading an additional word or words. Where the language is unambiguous, no ambiguity can be authorized by interpretation. Plain language should be afforded its plain meaning. Rules of interpretation are resorted to for the purpose of resolving an ambiguity, not for the purpose of creating it."

Finally, in **Wilson v. Hix**, (1951), 136 W. Va. 59, at 67, 65 S.E. 2d 717, at 723, the Court held:

> "In the absence of any definition of the intended meaning of words or terms used in a legislative enactment, they will, in the interpretation of the Act, be given their common, ordinary and accepted meaning in the connection in which they are used."

And the Court went on to hold:

> "In the construction of a statute every word must be given some effect and the statute must be construed in accordance with the import of its language."

An at least possible, if not, indeed, probable, explanation for the failure of the courts below to quote or make any reference to these rules of statutory construction is, first, it would

have been impossible to point out any ambiguity in either the federal interest rate statute or the West Virginia Procedural Usury Statute requiring construction rather than application, and, second, these rules as applied to the language of the latter statute would have imperatively forbidden any construction rendering lawful any rate of interest agreed upon by corporate borrowers. Any such construction would not only require a wholesale revision of the language of the statute but would render its very name a misnomer. It is regarded as a significant circumstance that opposing counsel, in their voluminous briefs in the courts below, neither quoted nor even mentioned these rules of statutory construction.

The federal usury penalty statute, Revised Statute 5198, 12 U.S.C. 86, is exclusive and precludes the application of state usury statutes. This federal statute provides the penalty and the remedy for its enforcement applicable to national banking associations, and has been uniformly held to be exclusive and to preclude the application of state usury statutes. See **Barnet v. Muncie National Bank**, (1878), 8 Otto 555, Headnotes 1, 2 and 3; **Stephens v. Monongahela National Bank**, (1883), 111 U.S. 197, Headnote 2; **Hazeltine v. Central National Bank**, (1901), 183 U.S. 132, Headnote; **Schuyler National Bank v. Gadsden**, (1903), 191 U.S. 451, Headnote; **First National Bank in Mena v. Nowlin**, 509 F. 2d 872, at 881, and Syl. 7, (Eighth Circuit, 1975); **Charleston National Bank v. Bradford**, (1902), 51 W. Va. 255, 41 S.E. 153, Points 1, 2 and 3 of Syllabus by Court; and **National Bank of Weston v. Lynch**, (1911), 69 W. Va. 333, 71 S.E. 389, Point 3 of Syllabus by Court. In **National Exchange Bank v. Boylen**, (1885), 26 W. Va. 555, in Point 3 of the Syllabus it is held:

> "Congress having prescribed the penalty for the taking of usurious interest by a national bank and likewise the remedy for recovering such interest, the States and their courts are bound thereby and can

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neither add to the penalty nor apply any remedy other than that so prescribed."

In **National Bank of Gloversville v. Johnson**, (1881), 14 Otto 271, at 290, this Court said:

> "In Section 5198, the forbidden transaction, for which the penalties are prescribed, is spoken of as usurious; but this reference is to the prohibitions of the preceding section, and not to the laws of the State."

II.

The Fact That Several States, Having Statutes Denying the Defense of Usury to Corporate Borrowers, Hold That Such Statutes Deprive Corporate Borrowers of Both the Defensive Shield and the Offensive Sword Has No Tendency To Impart To West Virginia's Procedural Usury Statute The Substantive Function of Making Lawful Any Rate of Interest Agreed Upon By Corporate Borrowers.

In the courts below, opposing counsel cited and relied upon state court cases from New York, Maryland, Michigan, Minnesota, Wisconsin, Florida and Pennsylvania holding that their respective procedural usury statutes denying the defense of usury to corporate borrowers deprived such borrowers of both the defensive shield and the offensive sword. Although none of these state court cases involved either the federal rate of interest statute or a national bank, opposing counsel theorized therefrom that such holdings made such statutes substantive interest fixing and allowing statutes rendering lawful any rate of interest agreed upon by corporate borrowers. And, as we have seen, the District Court, affirmed by the Court of Appeals for the Fourth Circuit, inferentially

but tacitly embraced this theory and awarded summary judgment. These procedural usury statutes, in terms, deny remedies against usurious charges to corporate borrowers, and their procedural character is not affected in any manner because, in one instance, they operate to defeat the defense against the payment of usurious interest, and, in the other instance, to interdict an action to recover back usurious interest actually paid. The usurious lenders were not immunized because their interest charges were by the statutes made lawful, (the literal language of the statutes negativing any such intention), but, rather, because the statutes, in terms, deprived the corporate borrowers of any remedy. Illustrative of such wholly inapposite state court cases are **Pink Lady, Inc. v. William Penn Loan Co.**, (1959), 189 Pa. Super 187, 150 A.2d 154; **Country Motors, Inc. v. Friendly Finance Corporation**, (1961), 13 Wis. 2d 475, 109 N.W. 2d 137; **Miller v. Reid**, (1928), 243 Mich. 694, 220 N.W. 748; and **Butterworth v. O'Brien**, (1858), 23 N.Y. 275.

III.

The Ascribed Congressional Purpose in Enacting the Federal Interest Rate Statute, Revised Statute 5197, 12 U.S.C. 85, of Insuring Equality of Competition Between State and National Banks Does Not Transcend and Override All Other Recognized Rules of Statutory Construction So As To Impart To West Virginia's Procedural Usury Statute a Substantive Interest Fixing and Allowing Function, Or So As To Preempt West Virginia's Right To Interpret Its Own Statutes.

Tiffany v. The National Bank of the State of Missouri, (1873), 85 U.S. (18 Wall.) 409, held that "**national banks have been national favorites**" and that, in enacting Revised Statute 5197, it was the Congressional intention to give national banks "**at least equal advantage**". As previously pointed out,

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in **Tiffany** the national bank was allowed to charge a greater rate of interest than was allowed to its state bank competitors. Granted that such was the Congressional intent and purpose, as we have demonstrated by the authorities cited intent and purpose alone are not sufficient; statutory language is required to effectuate such intent and purpose. Here it is totally lacking. The courts are powerless to read into, or to ingraft upon, the statute a proviso that in states having statutes denying the defense of usury to corporate borrowers the rate of interest shall be fixed at what ever rate may be agreed upon by such corporate borrowers. Congress could have done so, but it did not. Of course Congress could have adopted a federal usury statute, similar to West Virginia Code, 47-6-10, denying the defense of usury to corporate borrowers, but it did not. Resultantly, the ascribed Congressional purpose and intent has not been effectuated for the simple reason that state banks can get by with charges of usurious rates of interest to corporate borrowers because the state procedural usury statutes deprive such borrowers of any remedy.

An interesting and provocative sidelight on this matter of the ascribed Congressional purpose in enacting Revised Statute 5197, 12 U.S.C. 85, is provided in **Meadow Brook National Bank v. Recile**, 302 F. Supp. 62, (E.D. of La., 1969), where the Court, Opinion Page 74, said that "**the courts have strenuously endeavored to effectuate its purpose despite the fact that the language of that section may not clearly and readily yield the result intended by Congress.**" The Court then goes on to cite **Hiatt**, Supra, as an example, saying that **Hiatt** "**is such a case and which relies on the purpose of the statute to reach a result not obviously supported by the language of the section.**" We believe that the most strenuous effort would not yield a reasoned opinion in the instant case holding that the ascribed Congressional purpose was effectuated by the language of the statute as written.

IV.

Since Usury Is Universally Defined As the Exaction By a Lender of an Unlawful Rate of Interest, The Construction of West Virginia's Procedural Usury Statute, Code, 47-6-10, Denying The Defense of Usury To Corporate Borrowers, As Substantively Fixing and Allowing As Lawful Any Rate of Interest Agreed Upon By Such Corporate Borrowers, Would Require the Abrogation of All Recognized Rules of Statutory Construction To Permit A Wholesale and Complete Revision of the Literal Language of the Statute.

Any such construction would place West Virginia in the same position as Illinois, that is as if West Virginia, like Illinois, had adopted a statute providing that a corporation may lawfully agree to pay any rate of interest. See **Winkle v. Scott**, 99 F. 2d 299, at 302, (Eighth Circuit, 1938). But West Virginia has no such statute. If the rate of interest charged is lawful, there can be no usury. It follows that West Virginia cannot be held to have incongruously denied the defense of usury if in fact there was no usury. In **Ruffner v. Hogg**, (1861), 66 U.S. 115, this Court defined usury:

> "To constitute usury, there must either be a loan and a taking of usurious interest, or the taking of more than legal interest for the forbearance of a debt or sum of money due."

In **Brown v. American National Bank**, 197 F. 2d 911, at 915, (Tenth Circuit, 1952), the Court held:

> "The generally accepted definition of usury is the taking of a greater premium for the use of money loaned than the law allows."

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In **Reger v. O'Neal**, (1889), 33 W. Va. 159, 10 S.E. 375, at 377, defines usury as follows:

> "Usury is interest exceeding the legal rate for the loan or forbearance of money."

A loan by a national bank, or, for that matter, by any bank, of a specified amount at the highest legal rate of interest upon condition that the borrower leave a portion continually on deposit, or on deposit with a participating bank, is usurious. See **Planters National Bank of Virginia v. Wysong & Miles Co.**, (1919), 177 N.C. 380, 99 S.E. 199. See, also, **Crim v. Post**, (1895), 41 W. Va. 397, 23 S.E. 613, Syl 3, holding that a search for usury shall not stop at the mere form of the bargains and contracts, but that all shifts and devices intended to cover a usurious loan or forbearance shall be pushed aside, and the transaction be dealt with as usury if it be such in fact. To same effect, see **Carper v. Kanawha Banking & Trust Co.**, (1974), ___ W. Va. ___, 207 S.E. 2d 897, Point 4 of the Syllabus by the Court. In **Planters**, Supra, Point 3 of the Syllabus holds:

> "Where a national bank made loan with understanding and agreement that it should retain 20 per cent. of the amount loaned as a deposit of the borrower in the bank, which should not be subject to his check or withdrawn but should remain on general deposit under control of the bank, and the full legal rate of interest was reserved on the whole of the amount nominally loaned, the transaction was usurious."

In the Opinion, (99 S.E. 199, at 204), the Court said:

> "This kind of usurious agreement has been cast in various forms, but the courts have invariably stripped it of its flimsy disguise, and decided according to its substance and its necessary tendency and effect, when

> the purpose and intent of the lender are unmistakable. And this is the correct rule."

In the Opinion, (99 S.E. 199, at 203), quoting from a New York case, the Court said:

> "Assuming these facts to be true, it presents a case of bold, unmitigated violation of the statute in its letter and spirit. If the statute prohibiting usury can be evaded by such a subterfuge as has been offered in this case, it has become a dead letter, and had better be repealed at once."

And, in the Opinion, (99 S.E. 199, at 203), quoting from a New Jersey case, the Court said:

> "I think it is well calculated to show how very hard is the way of the transgressor, and to impress upon us the truth that if shallow devices are to be permitted to succeed in overcoming the defense of usury, great elasticity of conscience, and great injury to the cause of morals, will be the result."

CONCLUSION

For the reasons set forth above, this petition for a writ of certiorari should be granted.

Respectfully submitted,
Wm. Bruce Hoff
Counsel For Petitioner

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APPENDIX A

Opinion of The United States Court of Appeals
For the Fourth Circuit
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

APPEAL NO. 75-1737

MONONGAHELA APPLIANCE COMPANY,
A WEST VIRGINIA CORPORATION,
PLAINTIFF, APPELLANT
VS.
COMMUNITY BANK AND TRUST, N.A.,
A NATIONAL BANKING ASSOCIATION,
DEFENDANT, APPELLEE

(District Court Civil Action No. 74-50-F)

Appeal From The United States District Court
For The Northern District of West Virginia

Submitted On Briefs December 5, 1975, Before Circuit Judges Butzner and Widener and District Judge Merhige

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Wm. Bruce Hoff, Parkersburg, W. Va., For Appellant.

John D. Amos, Alfred J. Lemley and Frederic R. Steele, Fairmont, W. Va., For Appellee.

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OPINION OF THE COURT

(Filed January 2, 1976)

PER CURIAM:

Monongahela Appliance Company, Inc., appeals from a judgment of the district court denying recovery of allegedly usurious interest it paid to the Community Bank and Trust, a national bank. Under 12 U. S. C. 85 a national bank may charge interest at the rate allowed by the state laws where it is located. The district court held that the bank was not liable because the West Virginia usury laws provide that no corporation shall interpose the defense of usury. W. Va. Code Ann. 47-6-10 (1966); cf. **McNellis v. Merchants National Bank & Trust Co.**, 390 F. 2d 239 (2d Cir. 1968). We affirm on the basis of the district court's opinion.

APPENDIX B

Opinion of The United States District Court
For The Northern District of West Virginia

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF WEST VIRGINIA

MONONGAHELA APPLIANCE COMPANY,
A WEST VIRGINIA CORPORATION,
PLAINTIFF

VS.

COMMUNITY BANK AND TRUST, N.A.,
A NATIONAL BANKING ASSOCIATION,
DEFENDANT

CIVIL ACTION NO. 74-50-F

WM. BRUCE HOFF, PARKERSBURG, W. VA.,
FOR PLAINTIFF.

JOHN D. AMOS, ALFRED J. LEMLEY AND
FREDERIC R. STEELE, FAIRMONT, W. VA.,
FOR DEFENDANT

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MEMORANDUM ORDER

(Filed May 2, 1975-393 F. Supp. 1226)

"Maxwell, Chief Judge.

"This is an action to recover $268,427.46, twice the amount of the allegedly usurious interest paid by plaintiff to defendant on a promissory note. The action is brought under 12 U.S.C. 85 and 86.[1] Jurisdiction is founded on 28 U.S.C. 1331 (federal question), and venue is laid under 12 U.S.C. 94. Defendant has filed a motion to dismiss for failure to state a claim upon which relief can be granted, Rule 12(b)(6), F.R.C.P. Plaintiff has filed a statement in opposition, including a motion to strike defendant's motion for failure to comply with Local Court Rule 2.07(d).

The essential facts in this action, as discerned from the pleadings and briefs of counsel may be stated as follows:

On December 30, 1972, the parties executed a Business Loan Agreement (Plaintiff's Exhibit A), whereby defendant agreed to loan to plaintiff $950,000.00, at an interest rate of 8½ to 11½% on the unpaid balance, the rate to be subject to a scale of Prime Rate determined by Union Commerce Bank, Cleveland, Ohio, a participating bank, plus 3%. The loan was payable in 72 monthly installments of $13,194.44 plus interest, payable beginning on February 10, 1973, and monthly thereafter.

The loan was evidenced by a promissory note (Plaintiff's Exhibit B) of even date, in the principal amount of $950,000.00, and the note was secured by a Security Agreement, Financing Statements, and other matters set out in paragraph 2 of the Business Loan Agreement (copies of which are attached as Exhibits to plaintiff's brief in opposition to the motion to dismiss).

The portion of paragraph 2 of the Business Loan Agreement which is significant with regard to the issue before the Court is subparagraph 2j, which provides that:

> 'The debtor shall maintain a DEMAND DEPOSIT ACCOUNT at UNION COMMERCIAL BANK, in Cleveland, Ohio, in the amount of $100,000.00 or 20% of that Bank's Participation of the outstanding balance due on said Loan, whichever is the lesser.'

It is apparently uncontroverted that plaintiff had available for its use only $850,000.00, presumably because it had no assets other than $100,000.00 of the money loaned with which to maintain the demand deposit account referred to in subparagraph 2j of the Business Loan Agreement. Plaintiff made payments on the unpaid balance of the loan, plus interest, through May 10, 1974. After that date plaintiff declined to pay interest on the $100,000.00 in the demand deposit account and on September 9, 1974, tendered its check for $4,417.61. This amount represented the payment of principal and interest due on September 10, 1974, less the interest paid by the plaintiff on the $100,000.00 maintained in the demand deposit account from the inception of the transaction through May 10, 1974, when plaintiff ceased making interest payments on the $100,000.00. Defendant rejected the tendered payment, and pursuant to the acceleration clause in the promissory note, demanded payment of the principal balance due, $710,076.55, plus interest at the rate of $224.34 per day.

Plaintiff allegedly continued doing business until sometime in December 1974, during which time the parties were in litigation, not germane to the instant action, in state court. This action was instituted on December 27, 1974, and is now before the Court on the motions referred to heretofore.

Before turning to the merits of the defendant's motion to dismiss, it is necessary to consider plaintiff's motion to strike defendant's motion to dismiss.

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Plaintiff quotes the portion of Local Court Rule 2.07(d), which provides that:

> 'If the motion . . . requires consideration of facts not appearing of record, the party shall so state in the motion . . . setting forth precisely the matters of fact he believes are necessary to the proper disposition of the pending motion.'

Plaintiff contends that defendant asserts factual matters outside the pleading in its brief rather than in the motion, and that these factual allegations are not supported by affidavit or otherwise.

The exhibits atached to 'Plaintiff's Statement and Memorandum in Opposition to Defendant's Rule 12(b) Motion to Dismiss Plaintiff's Complaint and Action,' together with the pleadings and exhibits thereto, provide the basis for the essential facts as recited therein, and established, the Court believes, the necessary factual background for determination of defendant's motion to dismiss. Accordingly, in order to complete the record, it is

ORDERED that all memoranda of law, including exhibits attached thereto, submitted by counsel be filed and made a part of the record. Upon consideration of all matters presented with respect to plaintiff's motion to strike defendant's Rule 12(b)(6) motion to dismiss, it is

ORDERED that said motion be, and the same is hereby denied, as is the alternative motion to strike defendant's memorandum of law in support of its motion to dismiss.

Plaintiff's complaint alleges that the interest exacted from it in this transaction was usurious within the meaning of 12 U.S.C. 85, and that it is entitled to recover twice the amount of the entire interest paid, pursuant to 12 U.S.C. 86. Defendant contends that 12 U.S.C. 85, which permits a national bank to charge interest at the rate allowed by the laws of the state where it is located, and West Virginia Code

47-6-10 (Michie 1966),[2] which precludes corporations from asserting usury as a defense, operate to defeat plaintiff's claim for relief.

The purpose of 12 U.S.C. 85 is to place national banks on an equal footing with state banks. **Daggs v. Phoenix National Bank**, 177 U.S. 549 (1900); **Tiffany v. National Bank of Missouri**, 85 U.S. (18 Wall.) 409 (1873). This purpose is accomplished by the statutory adoption of state law for determination of the maximum rate of interest chargeable. Thus, it must be determined whether the transaction in issue is usurious under the law of West Virginia.

West Virginia Code 47-6-10 (Michie 1966) has remained unaltered since its adoption in 1863, and the only reported case which refers to the statute is **Baltimore and O. R. Co. v. Wilson**, 2 W.Va. 528 (1868), wherein the Court merely stated, at 555:

> '. . . In the first place no question of usury can arise this case because incorporate companies are exceptions from the operation of the usury laws.' (Citation omitted.)

Although there have been no definitive decisions by the highest court of the state, statutes similar to the West Virginia corporate-exception statute have been construed to repeal the usury laws insofar as corporations are concerned. Judge Augustus N. Hand, speaking for the Court in **In re International Raw Material Corporation**, 22 F. 2d 920 (2d Cir. 1927), spoke in almost precisely those terms:

> '. . . The New York statute provides that no corporation shall interpose the defense of usury, and this has been held in effect to repeal the usury laws so far as the contracts of corporations are concerned.' **Id.** at 922.

Defendant has cited authorities from seven jurisdictions, as well as a number of secondary authorities, in support of the principle that statutes denying usury as a defense to corporations have been construed to also deny the availability of

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usury for affirmative relief. Plaintiff has suppied no authorities to the contrary, and the Court has found none. The unassailable conclusion that must be drawn is that this is the position that would be adopted by the West Virginia Supreme Court of Appeals if this question were presented to it.

It seems abundantly clear that 12 U.S.C. 85 incorporates state law not only as to the maximum interest rate chargeable, but also as to the exceptions thereto. **McNellis v. Merchants National Bank & Trust Co. of Syracuse**, 390 F. 2d 239 (2d Cir. 1968); **Meadow Brook National Bank v. Recile**, 302 F. Supp. 62, 76-77 n. (E.D. La. 1969). The Comptroller of the Currency has also adopted this position, as set forth in 12 C.F.R. 7.7310(b):

> 'A national bank located in a State the law of which denies the defense of usury to a corporate borrower may charge a corporate borrower any rate of interest agreed upon by such borrower.'

From the foregoing, the Court concludes that 12 U.S.C. 85 and West Virginia Code 47-6-10 (Michie 1966), as applied to the facts of this case, operate to defeat the maintenance of the action. Accordingly, it is

ORDERED that defendant's motion to dismiss for failure to state a claim upon which relief can be granted, treated as a motion for summary judgment pursuant to Rule 56, F.R.C.P., be, and the same is hereby granted, and this action is dismissed.

ENTER: May 2, 1975.

Robert E. Maxwell
United States District Judge"

Footnotes 1 and 2 contain verbatim quotations of 12 U.S.C. 85; 12 U.S.C. 86; and West Virginia Code, 47-6-10, all of which sections are quoted in the accompanying Petition under the heading Statutes Involved.

APPENDIX C

Other West Virginia Procedural Usury Statutes Not Believed To Be Involved

West Virginia Code, 47-6-7, provides:

"Any defendant may plead in general terms that the contract or assurance on which the action is brought was for the payment of interest at a greater rate than is allowed by law, to which plea the plaintiff shall reply generally, but may give in evidence upon the issue made thereon any matter which could be given in evidence under a special replication. Under the plea aforesaid, the defendant may give in evidence any fact showing, or tending to show, that the contract, or assurance, or other writing upon which the action was brought, was for an usurious consideration. Upon such plea the court shall direct a special issue to try and ascertain: (a) Whether or not the contract, assurance or other writing is usurious; (b) if usurious, to what extent; (c) whether or not interest has been paid on such contract, assurance or other writing, above the legal rate, and if so, to what extent; (d) if a verdict be found for the defendant upon the plea of usury, a judgment shall be rendered for the plaintiff for the principal sum due, with interest at the legal rate, and, if any interest has been paid above the legal rate, the excess over and above that rate, shall be entered as a credit on the sum due; but if nothing be found due after applying all credits and all excesses of interest paid above the legal rate, judgment shall be entered for the defendant; and if the total of such credits and interest paid exceed the principal sum due with legal interest thereon, the defendant shall have judgment for the difference. The provisions of this section shall not apply in any case where suit is brought on a contract, assurance or writing, is for the payment of interest at a rate which is prohibited by the terms

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of the following article. (Code 1849, c. 141, Section 6; Code 1860, c. 141, Section 6; Code 1868, c. 96, Section 6; 1882, c. 104, Section 6; Code 1923, c. 96, Section 6.)"

West Virginia Code, 47-6-8, provides:

"Any borrower of money or other thing may exhibit a bill in equity against the lender, and compel him to discover upon oath the money or thing really lent, and all bargains, contracts, or shifts relative to such loan, and the interest or consideration of the same; and, if it appear that more than lawful interest was reserved, the lender shall recover his principal money or other thing with six percent interest only, but shall recover no costs. If property has been conveyed to secure the payment of the debt, and a sale thereof is about to be made, or is apprehended, an injunction may be awarded to prevent such sale pending the suit. But nothing in this section shall have the effect of permitting a recovery on any contract which is void under the provisions of the following article. (Code 1849, c. 141, Section 7; Code 1860, c. 141, Section 7; Code 1868, c. 96, Section 7; Code 1923, c. 96, Section 7.)"

West Virginia Code, 47-6-9, provides:

"If an excess beyond the lawful interest be paid in any case for the loan or forbearance of money or other thing, the person paying the same may in a suit or action recover the full amount of such payment from the person with whom the assurance was given; and it may be so recovered from such person notwithstanding the payment of the excess be made to his indorsee or assignee. (1931 Code, Section 47-6-9.)"

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

NO. 75-1387

MONONGAHELA APPLIANCE COMPANY,
A WEST VIRGINIA CORPORATION,
PETITIONER
VS.
COMMUNITY BANK AND TRUST, N.A.,
A NATIONAL BANKING ASSOCIATION,
RESPONDENT.

ON PETITION FOR A WRIT OF
CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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RESPONDENT.

ON PETITION FOR A WRIT OF
CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

The Respondent, Community Bank and Trust, N.A., respectfully prays that the petition for a writ of certiorari filed by Monongahela Appliance Company to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in this cause on January 2, 1976, be denied.

OPINIONS BELOW

The opinion of the United States District Court for the Northern District of West Virginia will be found in Appendix B to the Petitioner's Petition at 3a-8a and is reported at 393 F. Supp. 1226. The opinion of the Court of Appeals is not yet reported but is found in Appendix A to the Petition at 1a-2a.

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JURISDICTION

Counsel for the Respondent accepts the jurisdiction statement of counsel for Petitioner.

COUNTER-STATEMENT OF QUESTION PRESENTED

Respondent believes that the only pertinent issue presented by the statement of facts agreed to below is as follows:

> Do the provisions of 12 U.S.C. §85 afford national banks the right to charge as much interest as is chargeable by state banks under its local law?

Counsel for Respondent firmly believe that the authorities hereinafter cited clearly answer the above question in the affirmative and that such answer is dispositive of the questions posed by the Petitioner and therefore the Petition must be denied.

STATEMENT OF CASE

Counsel for the Respondent will accept the Petitioner's statement of facts as set forth in the first paragraph at page 2 of its Petition.

The remaining portions of the Petitioner's statement are not considered by the respondent as a statement of facts pertinent to the case but argument which will be replied to below.

The Court should deny the petition for a writ of certiorari for reason that there is no conflict in the decisions of the United States Courts of Appeals and all of the general law of the United States and of the state courts on the issue presented herein holds contrary to the contention of Petitioner.

ARGUMENT

Respondent's position is that it, as a national banking association operating in the State of West Virginia, is permitted under 12 U.S.C. §85 to charge any interest allowed by the statutory laws of West Virginia which set forth the state's limitations on usury; that it is permitted the same competitive opportunities and may charge the same rate of interest allowed to state chartered banks in West Virginia; that West Virginia Code 47-6-10 (i.e., "No corporation shall interpose the defense of usury. . . .") creates an exception to the numerical usury rate which exception is available to it as well as to state chartered banks, and that the interest rate charged Petitioner was "interest at the rate allowed by the laws of the State" under 12 U.S.C. §85.

I. Corporations Are Exceptions to the Operation of the Usury Laws in West Virginia

West Virginia Code 47-6-10 has been cited under its former Code reference by the Supreme Court of Appeals of West Virginia in only one case wherein it stated:

> In the first place no question of usury can arise in this case because *incorporate companies are exceptions from the operation of the usury laws.* Code, chapter 57, section 38, page 337. (Emphasis Added) *B. and O. R. R. v. Wilson,* 2 W. Va. 528, 555 (1868).

In *In Re Raw Material Corporation,* 22 F.2d 920 (2d Cir. 1927), Judge Hand spoke in almost precisely the same language of the West Virginia court:

> . . . . The New York statute provides that no corporation shall interpose the defense of usury,

> *and this has been held in effect to repeal the usury laws so far as the contracts of corporations are concerned. Id.* at 922. (Emphasis Added)

Accordingly, under the statutory law of West Virginia, Code 47-6-10, the Petitioner cannot raise the issue of usury defensively in any suit or proceeding at law in West Virginia.

II. A Corporation May Not Sue A National Bank for A Statutory Penalty for Usurious Interest if the Corporation Is by Statute Precluded From Asserting the Defense of Usury

Since the Petitioner, when sued, cannot interpose the defense of usury, it may not bring an affirmative action to invalidate the interest which it had contracted to pay and recover the statutory penalty provided by laws for violation of the usury statute. Respondent can find no other West Virginia judicial interpretation of Code 47-6-10 but courts of other states have held consistently that where the state law denies the defense of usury to corporations it also denies to the corporation any benefit of the usury laws when the corporation seeks affirmative relief.

It is "Horn Book Law" that:

> A corporate borrower may not sue for a statutory penalty if corporations are, by statute, precluded from asserting the defense of usury. 45 *Am. Jur.* 2d, *Interest and Usury,* §319, p. 244.
>
> The acts denying the defense of usury to corporations have been construed to deny to them also the benefit of the usury laws when they are seeking affirmative relief. 91 C.J.S., *Usury,* §74, p. 652.

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This rule has been called the "shield" and "sword" theory; that is, when a statute provides that a corporation shall not interpose the defense of usury, it bars the corporation from claiming usury as a "shield" to protect it from actions to recover usurious interest, and it bars the corporation from affirmatively using usury as a "sword" to recover a statutory penalty for violation of usury statutes.

In the United States the exception to the applicability of usury provisions, that a corporate borrower may not sue for a statutory penalty if the corporation is by statute precluded from asserting the defense of usury is one of long-standing and general application, and is supported, to the best of Respondent's knowledge, *by all existing judicial decisions.* There is no conflict in the Circuit Courts of Appeals on this point. The holdings are of such general application that it is easy to see why no corporation in West Virginia has sought to use the usury statute as a "sword" when it cannot use it as a "shield."

The following are excerpts from cases interpreting the usury laws of the states of Wisconsin, Pennsylvania, Michigan, New York, and Minnesota, all of which support this proposition.

WISCONSIN: *Country Motors, Inc., v. Friendly Finance Corp.,* 13 Wis. 2d 475, 109 N.W.2d 137, 140 (1961)

It would then seem absurd to permit a lender to collect principal and agreed interest from a corporation, but to permit the corporation to recover from the lender three times the amount by which the interest exceeded the statutory rate. *While the words of the clause speak only of denying a defense, we conclude that they imply the denial of an affirmative right of action based upon the same facts.* (Emphasis Added)

PENNSYLVANIA: *Municipal Leasing Systems, Inc., v. Northamption National Bank of Easton,* 382 F. Supp. 986 (E.D.Pa. 1974)

Section 313 of the Business Corporation Law of Pennsylvania provides as follows:

No business corporation shall plead or set up usury, or the taking of more than six per cent interest, as a defense to any action brought against it to recover damages on, or to enforce payment of, or to enforce any other remedy on, any mortgage, bond, note, or other obligation executed or effected by the corporation.

The Court stated at page 970:

A Pennsylvania business corporation may not assert a defense of usury nor maintain an action in either Pennsylvania state courts or a federal court sitting in Pennsylvania to recover usurious interest or any statutory penalty provided for usurious loans.

MICHIGAN: *Miller v. Reid,* 243 Mich. 694, 220 N.W. 748, 749 (1928)

[1] The Legislature, by Act No. 335, Public Acts 1927, pt. 2, c. 1, §1, provided that:

> No corporation shall interpose the defense of usury to any cause of action hereafter arising.

Statutes of similar import exist in some other states, and have been held to be remedial in nature and entitled to a liberal construction. *Rosa v. Butterfield,* 33 N.Y. 665, 669.

As stated in a note in 14 Ann. Cas. 115:

> However, the effect of the act is not limited to the case of a corporation made a party defendant to an action, and setting up usury as a defense thereto. The Courts have interpreted the word 'defense' to mean 'any position or attitude in an action in which a corporation seeks to avoid its own contract by showing that it is usurious.' This interpretation was adopted because the contrary construction would have defeated all the beneficent purposes of the statute. (Citation Omitted).

NEW YORK: *Butterworth v. W. & J. O'Brien,* 23 N.Y. 275 (1858)

The language is general and unqualified. It takes away the defense—the *objection* of usury. It strikes it out of existence, and the ordinary consequences must follow. It not only disallows the defense, but it forbids it to be used in any way defensively; that is, to accomplish the same object by affirmative action, as, for example in a proceed-

ing to vacate or set aside a contract, as would be accomplished by strictly defensive action, as for example, in setting up the usury in an answer to an action upon the contract. If it goes this length, and it was rather conceded on the argument that it did, then I think it goes still further, and forbids not only a defense to an action for the usury or usurious premium, but forbids an action to recover back the usurious premium. The money borrowed, the legal interest, and the usurious premium are all mingled together in one transaction, form part of one single and indivisible contract, and when the statute says the defense of usury shall not be interposed to it, I think it means to each and every part of it—no one part more than another.

MINNESOTA: *Bickel Optical Laboratories, Inc. v. The Marquette National Bank of Minneapolis,* 336 F. Supp. 1368 (Minn. 1971)

Plaintiff contended that it was not asserting usury as a defense to payment under the Minnesota statute which provided that no corporation shall interpose the defense of usury in any action, but was seeking affirmatively to affect a recovery of damages resulting from the seizure of funds available from a claimed usurious loan.

The Court stated at page 1370:

. . . the above statute has no real significance unless in effect it removes or repeals usury laws insofar as loans to corporations are concerned. A number of cases considering similar or identical situations from other jurisdictions have so held, *Country Motors, Inc. v. Friendly Finance Corp.,* 13 Wis.2d 475, 109 N.W. 2d 137 (1961); *Curtis v.*

> *Leavitt,* 15 N.Y. 9 (1857); *Rosa v. Butterfield,* 33 N.Y. 665 (1865); *MacQuoid v. Queens Estates,* 143 App. Div. 134, 127 N.Y.S. 867 (1911); *Penrose v. Canton Nat. Bank,* 147 Md. 208, 127 A. 852 (1925). The Court concurs in those holdings. * * *

At page 16 of the Petition, opposing counsel characterizes as "untenable" the position of the Respondent in the Courts below, that by the adoption of W. Va. Code 47-6-10 West Virginia adopted the case law of New York construing its similar statute. Counsel for Petitioner emphasizes the chronology of events subsequent to the New York statute passed in *1850,* i.e., adoption of similar language in passing what is now West Virginia Code 47-6-10 in *1855* by the Virginia Assembly and the *Butterworth* decision in *1858.* While the rule of statutory construction stated in 82 C.J.S. *Statutes* §372 and cited in Petitioner's brief at page 17 may be useful, *it is not without exception.* 82 C.J.S. *Statutes* §373b at page 867 provides that while construction of a statute by the court of the original state after the adoption by another state has no controlling effect, *such construction may be strongly persuasive,* citing *Allen v. Raleigh-Wyoming Mining Co.,* 117 W.Va. 631, 186 S.E. 612, (1936). In the *Allen* case the West Virginia court was called upon to construe certain language in the West Virginia Workmen's Compensation Act of *1913.* The West Virginia act substantially followed the act of the State of Washington enacted in *1911.* In *1913* the State of Oregon adopted its compensation act. A portion thereof was construed by the Oregon Supreme Court in *1916.* In *1922* the Supreme Court of Washington adopted the definition of certain language laid down by the Supreme Court of Oregon in *1916.* In *Allen, supra.* the West Virginia Supreme Court

discussed the above statutory history of the three states, and, in construing the identical language, i.e., *"the deliberate intention"*, of the West Virginia Statute, adopted the construction placed upon said language by the courts of Oregon and Washington and at page 636 of the West Virginia Report, the court said:

> In construing statutes adopted from another state, the judicial interpretation already placed on that statute by the highest judicial tribunal of such state will usually be adopted. *Nimick & Co. v. Mingo Iron Works Co.,* 25 W. Va. 184; *Rose v. Public Service Comm.,* 75 W. Va. 1, 83 S.E. 85, L.R.A. 1915B, 358, Ann. Cas. 1918A, 700; *Kirk v. Firemen's Ins. Co.,* 107, W. Va. 666, 150 S.E. 2, Subsequent decisions, however, have no controlling effect *but are highly persuasive and entitled to great consideration,* 25 R.C.L. 1073, sec. 295; 59 C.J. 1071, sec. 629; Annotation, Ann. Cas. 1917B, 651, 656. (Emphasis Added)

In the present case, Respondent submits that the United States District Court for the Northern District of West Virginia, as affirmed by the United States Court of Appeals for the Fourth Circuit, performed its duty in accordance with *Erie Railroad Co. v. Tompkins,* 304 U.S. 64, 82 L.Ed. 1188, 58 S.Ct. 817, i.e., and made an informed prediction based upon 12 U.S.C. §85, W. Va. Code 47-6-10, *B. and O. R. R. v. Wilson, supra,* and all other statutory and decisional law on the subject and reached the unassailable conclusion that the Supreme Court of Appeals of West Virginia would interpret W. Va. Code 47-6-10 to preclude recovery by the Petitioner.

It is therefore Respondent's position that West Virginia Code 47-6-10, on its face, supported by Court decisions of other states interpreting similar usury statutes from which West Virginia law was adopted, and the well-established general law on the subject, precludes a West Virginia corporate borrower from suing a national bank for a statutory usury penalty just as it precludes a corporation from asserting usury as a defense.

III. The Intent of 12 U.S.C. §85 Is to Insure That National Banks Shall Be Competitive With State Banks as to Interest Rates

In the United States Court of Appeals for the Fourth Circuit counsel for the Petitioner in its Brief at page 13 conceded that:

> * * * Monongahela concedes that the West Virginia statute, Code 47-6-10, * * *, effectively not only bars usury as a defense to corporations, that is, as a shield, but as an offensive weapon, that is, as a sword, in state court cases not involving national banks.

Petitioner thereby agreed with the conclusions of the District Court concerning the interpretation of the West Virginia Statute and the general law that a corporate borrower may not sue for a statutory penalty if corporations are, by statute, precluded from asserting the defense of usury insofar as *state banks are concerned,* but contends that the National Bank Act 12 U.S.C. §85, created an exception which *denies to national banks the benefits of the general law permitted a state bank.* This contention would place a national bank in West Virginia

in a position inferior to that of state banks and thereby defeat the intent of Congress to give national banks "at least equal advantage."

Petitioner cites no case or statutory authority for its contention, and in fact, all decisions on this matter deny the validity of such an argument. In *Hiatt v. San Francisco National Bank,* 361 F.2d 504 (9th Cir. 1966) *cert. den.* 385 U.S. 948, a case remarkably similar to the case at hand, the Ninth Circuit rejected an argument similar to the one presented by Petitioner.

Syllabus point number 2 of *Hiatt* states the following:

> Under federal statute relating to the right of national bank to charge as much interest as is chargeable by the state's banks under its local law there is a congressional intent that competitive opportunities of the national bank operating in a certain state should not be impeded by congressional limitations or interest charges which are more restrictive than state limitations imposed upon the state's banks. 12 U.S.C.A. §85

In its opinion in *Hiatt,* the Court rejected the arguments of Appellant, arguments similar to those of Petitioner herein, and discussed several cases as authority for its ruling:

> Appellant urges that 'no rate is fixed by the laws of the State' and that, hence, appellee was forbidden to collect an interest charge in excess of 10 percent per annum, the maximum chargeable rate permissible to most lenders under California law.
>
> * * *

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Argument

Appellant's contentions are ingenious and technically forceful. They also appeal to an equitable sense offended by oppressively exorbitant charges; nevertheless, we are convinced that they must be rejected. Considering the federal statute in its entirety, we clearly see a congressional intent that the competitive opportunities of a national bank operating in a certain state should not be impeded by congressional limitations on interest charges which are more restrictive than state limitations imposed upon the state's banks. This intent has twice been emphasized by the Supreme Court. As early as 1874, it was written,

'The defendant [bank] is not to be subjected to a penalty [for usurious charges] unless the words of the statute precisely impose it.' (Emphasis Added)

* * *

It cannot be doubted, in view of the purpose of Congress in providing for the organization of National banking associations, that it was intended to give them a firm footing in the different States where they might be located. It was expected that they would come into competition with State banks, and it was intended to give them at least equal advantages in such competition. In order to accomplish this they were empowered to reserve interest at the same rates, *whatever those rates might be,* which were allowed to similar State institutions. (Emphasis Added.) *Tiffany v. National Bank of Missouri,* 18 Wall. (85 U.S.) 409, 410, 412, 21 L.Ed. 862 (1873).

In *Daggs v. Phoenix National Bank,* 177 U.S. 549, 20 S.Ct. 732, 44 L.Ed. 882 (1900), the Court wrote,

> The meaning of these provisions [in the federal statute] is unmistakeable. A national bank may charge interest at the rate *allowed* by the laws of the state or territory where it is located; and equality is carefully secured with local banks. (Emphasis in original.)
>
> * * *The intention of the national law is to adopt the state law, and permit to national banks what the state allows to its citizens *and to the banks organized by it.* (Emphasis Added.) 177 U.S. at 555, 20 S.Ct. at 735. (Citations omitted.)

We cannot avoid the plain direction of the foregoing expressions of the Supreme Court. In *Daggs,* the defendant national bank was located in Arizona, where the state law provided that 'Parties may agree in writing for the payment of any rate of interest whatever* * *.' 177 U.S. at 554, 20 S.Ct. at 734.

There, as here, it was contended that the Arizona statute *fixed* no minimum *rate* of interest for Arizona state banks and that it followed that the national bank was prohibited from charging a rate in excess of the rate specified in the federal statute. The contention was rejected. The silence of California's legislature produces the same effect in California as that resulting in Arizona from the Arizona statute authorizing lenders and borrowers to 'agree in writing for the payment of any rate of interest whatever'. This being true, there is no

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distinction sufficient to justify a conclusion here which would oppose that reached by the Supreme Court in its analysis of the federally prescribed permissions and restrictions as affected by the terms of the Arizona statute.

No specific maximum rates were 'fixed' by the Arizona statute, but in true effect, the law in both Arizona and California has 'fixed' the rates for state banks in two jurisdictions as without limitation except such as may be established by agreements between the banks of the two states and those who borrow from them.

Our conclusion must necessarily be that the language of 12 U.S.C. §85 which reads 'any association may* * *charge* * *interest at the rate allowed by the laws of the State* * *where the bank is located* * *' should be construed as meaning that a national association located in a particular state may charge as much interest as may be legally charged by the state's banks under the state's existing law.

In *McNellis v. Merchants National Bank & Trust Co. of Syracuse,* 390 F.2d 239, 241 (2nd Cir. 1968), the Court reached the same conclusion that the Court did in *Hiatt*:

The New York law of usury is controlling as to national bank Merchants because 12 U.S.C. §85 *so provides.* Under New York law, the maximum rate of interest that generally may be charged is six per cent per year. (Citing statutes) * * *Nevertheless, for many years corporations in New York have been barred from claiming usury. The General Obligations Law §5-521 now provides: 'No corporation

shall hereafter interpose the defense of usury in any action.* * *' *Therefore, if the building loan here was to the Corporation, it cannot recover the payments of eight and one-half per cent interest as usurious;* * *** (Emphasis Added).

In *Meadow Brook National Bank v. Recile,* 302 F. Supp. 62, 74 (E.D. La. 1969) the District Court reached the same conclusion, that is:

> * * *in interpreting an act of Congress, we must attempt to implement the congressional purpose in enacting the statute. In fact, in interpreting §85 the courts have strenuously endeavored to effectuate its purpose despite the fact that the language of that section may not clearly and readily yield the result intended by Congress. See, for example, *Hiatt v. San Francisco National Bank,* 361 F.2d 504 (9th Cir. 1966), which is such a case and which relies on the purpose of the statute to reach a result not obviously supported by the language of the section. The purpose of §85 was to place the national banks on an equal footing with the state banks so they would *not be limited by congressional restrictions in competing with state banks.* (Emphasis Added)
> *Daggs v. Phoenix National Bank,* 177 U.S. 549, 20 S.Ct. 732, 44 L.Ed. 882 (1900); *Tiffany v. National Bank of Missouri,* 85 U.S. (18 Wall.) 409, 21 L.Ed. 862 (1873).

In *Meadow Brook* at footnote number 7, on page 76 and 77 thereof the Court stated as follows:

> 7.* * **The defendants argued that the federal banking statute adopts the state law only as to the maximum rate of interest and*

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> ***does not incorporate statutes barring corporations from asserting the defense of usury. Such statutes, argued the defendants, are merely procedural. We cannot agree with this contention.*** As indicated above, the purpose of §85 was to place the national banks on an equal footing with the state banks. It would truly frustrate this purpose to refer only to the maximum rate of interest without also incorporating the exceptions thereto. To adopt the defendants' argument would result in rank discrimination against national banks, thus defeating the clear congressional intent. This we could not do. * * *If 12 U.S.C. §85 were applicable, we would reject the defendant's argument in light of the clear congressional purpose and the force of precedent.* * *This much is clear by the decision in *Hiatt v. San Francisco National Bank,* 361 F.2d 504 (9th Cir. 1966), which rejected an even more cogent argument, and which held that national banks may charge as much interest as may be legally charged by the state's banks under the state's existing law. (Emphasis Added)

The cases cited above clearly show that it was the intention of the national law, 12 U.S.C. §85, to permit to national banks what the state law allows to state banks, and that no discrimination was intended, as is contended by Petitioner, against national banks located in West Virginia.

IV. The Comptroller's Interpretive Rulings for National Banks Clearly Supports The Action of the Courts Below

The *Comptroller's Manual for National Banks* reflects the interpretation placed upon 12 U.S.C. §85 by the Federal body governing all National Banks.

The *Comptroller's Manual For National Banks, Interpretive Rulings of the Comptroller of Currency, Interest Charges and Usury,* provides as follows:

> Ruling 7.7310 Charging interest at rates permitted competing institutions; charging interest to corporate borrowers.
>
> A national bank may charge interest at the maximum rate permitted by state law to any competing state-chartered or licensed lending institution. If state law permits a higher interest rate on a specified class of loans, a national bank making such loans at such higher rate is subject only to the provisions of state law relating to such class of loans that are material to the determination of the interest rate. For example, a national bank may lawfully charge the highest rate permitted to be charged by a state-licensed small loan company or morris plan bank, without being so licensed.
>
> *A national bank located in a state the law of which denies the defense of usury to a corporate borrower may charge a corporate borrower any rate of interest agreed upon by such borrower.* (Emphasis Added)

In *Northway Lanes v. Hackley Union Nat. Bank & Trust Co.,* 464 F.2d 855 (6th Cir. 1972) the Court said at 864:

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Argument.

> The District Court's ruling is supported by the administrative interpretations of Comptrollers of the Currency over many years. We note in passing Ruling 7.-7310, 12 C.F.R. §7.7310, 36 F.R. 17015, * * *
>
> The above interpretations, made by an office charged with the responsibility of promulgating reasonable regulations pursuant to the National Banking Act, *and supported by the legislative history of the Act and by the Supreme Court's decision in Tiffany, supra, are entitled to deference by this Court.* (Emphasis Added) See, *Unemployment Compensation Commission v. Aragan,* 329 U.S. 143, 153, 154, 67 S.Ct. 245, 91 L.Ed. 136; *F.H.A. v. The Darlington, Inc.* 358 U.S. 84, 90, 79 S.Ct. 141, 3 L.Ed.2d 132; *Udall v. Tallman,* 380 U.S. 1, 17, 85 S.Ct. 792, 13 L.Ed.2d 616.

The interpretation placed upon 12 U.S.C. §85 is followed and relied upon by national banks to the extent that it has virtually become the "common law" of national banks. It is submitted therefore, that if the Comptroller's position would not be upheld, virtually every corporate loan made by national banks in West Virginia (as well as in each of the many other states having a state law denying the defense of usury to a corporation) would become usurious and all national banks would become subject to economically devastating penalties.

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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IN THE

SUPREME COURT of the UNITED STATES

OCTOBER TERM, 1975

No. 75-1387

MONONGAHELA APPLIANCE COMPANY,
A WEST VIRGINIA CORPORATION,
PETITIONER

VS.

COMMUNITY BANK AND TRUST, N.A.,
A NATIONAL BANKING ASSOCIATION,
RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT.

REPLY BRIEF FOR PETITIONER

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STATEMENT

Throughout the progress of this case in the District Court, in the United States Court of Appeals for the Fourth Circuit, and, now, in this Court, Petitioner's effort, in its briefs and

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petition, has been to place before opposing counsel for responsive answer, and before the courts for adjudication, the principal and primary issue which is as to whether or not West Virginia Code, 47-6-10, Petition, Page 9, can be construed as an interest allowing state law within the meaning of 12 U.S.C. 85, Petition, Page 5. Petitioner has never questioned that West Virginia Code, 47-6-10, procedurally deprives a corporate borrower of both the defensive shield and the offensive sword provided to borrowers generally by West Virginia Code, 47-6-6, Petition, Page 8. But the corporate borrower from a national bank is deprived of the defensive shield and the offensive sword provided to all borrowers by 12 U.S.C. 86, Petition, Page 6, only in the event West Virginia Code, 47-6-10, is held to be an interest allowing statute within the meaning of 12 U.S.C. 85 — **this because such is the import of both federal statutes, and because the federal usury penalty statute, 12 U.S.C. 86, is exclusive and precludes the application of state usury statutes.** See Petition, Pages 23 and 24 and the cases there cited.

In the courts below, Respondent's briefs at least tacitly recognized this principal and primary issue, but refused to consider the federal and state rules of statutory construction, Cf. Petition, Pages 17 to 23, which are determinative of this issue, except to seek to impose upon West Virginia the construction of West Virginia Code, 47-6-10, placed on the similar New York procedural statute in **Butterworth v. O'Brien**, 23 N.Y. 275, (1858), Cf. Petition, Pages 16 and 17. Apparently upon the authority of the hereinafter considered decision in a United States District Court case from Pennsylvania, in its brief in this Court, Respondent does not even tacitly recognize this principal and primarily issue. While still seeking to impose upon West Virginia the New York Rule of **Butterworth**, Respondent's Brief in this Court still refuses to consider the applicable federal and state rules of statutory construction.

Respondent's Brief in this Court, as did its briefs in the

courts below, (1) cites a number of state court cases not involving either the cited federal statutes or national banks, which, with the exception of **Butterworth**, do no more than hold that procedural state statutes like West Virginia Code, 47-6-10, deprive corporate borrowers of both the defensive shield and the offensive sword provided by state usury penalty statutes like West Virginia Code, 47-6-6; (2) cites a number of clearly inapposite federal court cases; and (3) attaches decisive significance to the ascribed Congressional intent and purpose in enacting 12 U.S.C. 85, while ignoring the inadequacy of the language employed to effectuate such intent and purpose, **and also ignoring the more pertinent but obvious and fully implemented intent and purpose of the West Virginia Legislature in enacting West Virginia Code, 47-6-10, in 1863 before the enactment of the National Banking Act of 1864.** In its brief in this Court, Respondent asks this Court to treat Section 7.7310 of the Comptroller's Manual For National Banks, Petition, Page 3, as "**the common law of national banks.**"

ARGUMENT

I.

West Virginia Code, 47-6-10, Procedurally Denying the Defense of Usury To Corporations, Deprives Corporate Borrowers of Relief Under West Virginia Code, 47-6-6, But Not Under 12 U.S.C. 86, As Code, 47-6-10, Is Not An Interest Allowing Law Within the Meaning of 12 U.S.C. 85.

In the courts below, the Respondent at least tacitly recognized that its successful defense depended upon the judicial determination that West Virginia Code, 47-6-10, served not only its obvious procedural function of depriving corporations of relief under West Virginia Code, 47-6-6, but constituted a state law within the meaning of 12 U.S.C. 85 substantively rendering lawful any rate of interest agreed upon by a corporation. But, here, in this Court, judging from its Points I

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and II, Pages 4 to 12, of its brief, Respondent appears to be contending that West Virginia Code, 47-6-10, **in and of itself without more and without regard to whether it performs a substantive interest allowing function within the meaning of 12 U.S.C. 85**, deprives a corporate borrower of the relief provided by the federal usury penalty statute, 12 U.S.C. 86. Any such contention, if actually intended by the Respondent, is interdicted by the unambiguous language of both federal statutes, and by the uniform holdings of this Court and of the Supreme Court of Appeals of West Virginia to the effect that the federal usury penalty statute, 12 U.S.C. 86, is exclusive and precludes the application of state usury statutes. See Petition, Pages 23 and 24 and the cases there cited. Besides, with the dubious exception of the hereinafter considered United States District Court case from Pennsylvania, the cases cited and relied upon by the Respondent provide no support for any such contention.

In the courts below, the keystones of Respondent's theory that West Virginia Code, 47-6-10, performed a substantive interest allowing function within the meaning of 12 U.S.C. 85 were the cases of **Butterworth v. O'Brien**, 23 N.Y. 275, (1858), and **In Re International Raw Material Corporation**, 22 F. 2d 290, at 923, (Second Circuit 1927). Neither of these cases involved either the federal statutes or a national bank. Both cases involved New York state statutes similar to West Virginia's procedural statute, Code, 47-6-10, and its usury penalty statute, Code, 47-6-6. In **Butterworth**, laying the foundation for the New York Rule, after citing its procedural statute similar to West Virginia Code 47-6-10, it was held:

> "Hence evidences of debt securing or reserving as against them (corporations) what would otherwise be an usurious premium are not void or illegal, **but are lawful**, and the whole amount may be recovered in an action."

Without citing **Butterworth**, the Second Circuit case of **In Re**

International Raw Material Corporation, Supra, arising in New York, followed the New York Rule. Of course, it was this New York Rule laid down in **Butterworth** which provided the foundation for **McNellis v. Merchants National Bank and Trust Company**, 390 F. 2d 239, (Second Circuit 1968), cited in the opinions of both of the lower courts and discussed in detail in the Petition.

There are several cases not involving either the federal statutes or national banks holding that procedural state statutes like West Virginia Code, 47-6-10, deprive corporate borrowers of relief under state usury penalty statutes like West Virginia Code, 47-6-6, but none of the cases cited by the Respondent go so far as to hold as did **Butterworth** that the state procedural statutes made otherwise usurious rates of interest lawful rates of interest.

In **Baltimore and Ohio Railroad Company v. Wilson**, 2 W.Va. 528, (1868), the first case cited in Respondent's Brief in support of its Point I, the Court held, Opinion, Page 554, that, since Wilson's execution on his judgment against Northwestern Virginia Railroad Company had never been delivered to any officer to be served, there was not any liability upon the garnishee, the Baltimore and Ohio Railroad Company, even if it was indebted to the judgment debtor. From the prefatory Statement, 2 W.Va. 529 to 548, it appears that there were complex accounts between the two railroad companies, and the garnishee sought and obtained, apparently without objection, its Instruction 10, 2 W.Va. 547 and 548, telling the jury that the action of the garnishee in charging the judgment debtor interest on interest did not "**affect with usury the pre-existing just debt**," but that the interest on interest should be eliminated in determining the amount of the indebtedness, if any, of the garnishee to the judgment debtor. After holding that the garnishee was not liable to the judgment creditor and with only the instruction reference to the subject of usury in either the prefatory Statement or the Opinion, the Court,

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without elaboration before or after, Opinion, Page 555, said:

> "In the first place no question of usury can arise in this case because incorporate companies are exceptions from the usury laws. Code, Chapter 57, Section 38, Page 337."

Contrary to what appears on Page 4 of Respondent's Brief, the Court's reference was to the Code of Virginia of 1860, which with only immaterial change was enacted in West Virginia in 1863 and became a part of the West Virginia Code of 1868 as Section 22 of Chapter 52, and is now West Virginia Code, 47-6-10. In Petitioner's view of the matter, it would require a truly fabulous flight of fancy to torture the quoted language of the West Virginia Court into a holding that the statute was an interest allowing law of the State of West Virginia within the meaning of 12 U.S.C. 85.

The only other case cited in Respondent's Brief in support of its Point I, that of **In Re International Raw Material Corporation**, Supra, has been discussed above and was discussed in the Petition at Page 16.

So-called Horn Book Law cited on Page 5 of Respondent's Brief in support of its Point II consists of quotations from 45 Am. Jur. 2d, Interest and Usury, Section 319, Page 244; and 91 C.J.S., Usury, Section 74, Page 652. These digest statements are supported only by the citation of cases holding that procedural state statutes like West Virginia Code, 47-6-10, deprive corporations of relief under state usury penalty statutes like West Virginia Code, 47-6-6. None of such cases involved either the federal statutes or national banks. None of such cases undertake to hold that such a procedural state statute is an interest allowing state law within the meaning of 12 U.S.C. 85. The state court cases of **Country Motors, Inc. v. Friendly Finance Corporation**, 13 Wis. 2d 475, 109 N.W. 2d 137; and **Miller v. Reid**, 243 Mich. 694, 220 N.W. 748, cited on Pages 7 and 8 of Respondent's Brief in support of its Point

II are typical of the cases cited by American Jurisprudence and Corpus Juris Secundum, and were included in the list of such cases discussed on Pages 24 and 25 of the Petition.

In the United States District Court case from Minnesota of **Bichel Optical Laboratories, Inc. v. Marquette National Bank**, 336 F. Supp. 1368, (1971), cited on Page 9 of Respondent's Brief in support of its Point II, the District Court was not dealing with an action in the nature of an action of debt under the federal usury penalty statute, 12 U.S.C. 86, but, rather, was dealing with a claim for damages for alleged illegal seizure of plaintiff's funds and an incidental claim for a penalty apparently under a Minnesota usury penalty statute similar to West Virginia Code, 47-6-6, **and, of course, such incidental claim was both substantively and procedurally unsound under the applicable federal usury penalty statute, 12 U.S.C. 86.** Moreover, it is apparent from District Court Judge Neville's Opinion at Page 1370 that the interest charged was not usurious under the borrowed Minnesota interest allowing statute.

In the "**dubious exception**" United States District Court case from Pennsylvania previously adverted to of **Municipal Leasing Systems Inc. v. Northhampton National Bank of Easton**, 382 F. Supp. 968, (E. D. Pa. 1974), cited on Page 7 of Respondent's Brief and being the only case not already discussed herein relied upon by Respondent in support of its Point II, the United States District Court, **upon the authority of Section 7.7310 of the Comtroller's Manual For National Banks, Petition, Page 3**, held that a Pennsylvania procedural statute similar to West Virginia Code, 47-6-10, deprived a corporate borrower of any relief under the federal usury penalty statute, 12 U.S.C. 86. See Point 1 of Syllabus by West. **Transparently, it was this case which induced or provoked the radical shift in Respondent's position discussed, Supra, in the first paragraph of this division of this brief entitled Argument.** Conceding that soundy reasoned interpetive administrative

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rulings are entitled to deferential consideration in the construction of statutes, this Court has never granted any such sweeping substantive law making power to any administrative agency. The same is so as to the United States Courts of Appeals. And Petitioner knows of no other similar holding by any of the United States District Courts.

In so radically shifting its position, the Respondent sought to preserve one of its escape bridges by renewing its attempt to impose the New York Rule of **Butterworth** upon West Virginia, Cf. discussion in Petition, Pages 16 and 17. See Pages 10 and 11 of Respondent's Brief. Petitioner's answer to the case of **Allen v. Raleigh-Wyoming Mining Company**, 117 117 W. Va. 631, 186 S.E. 612, (1936), cited on Page 10 of Respondent's Brief, is that the weight of the presumption that the adopting state also adopted the construction **previously** placed on the statute by the courts of the state of origin is dependent upon whether such construction is sound and reasonable. See 82 C.J.S. 862, Statutes, Section 372. There is no presumption in relation to the adoption of the construction of a statute by the courts of the state of origin **subsequent** to its adoption, and such subsequent construction can have no persuasive value when, as here, all the rules of statutory construction stated at Pages 17 to 23 of the Petition were flagrantly ignored.

II.

The Conceded Intent of 12 U.S.C. 85 To Attempt To Insure Equality of Competition Between National and State Banks Is Not Alone Sufficient To Effectuate Such Intent.

This topic is adequately covered in Part III, Pages 25 and 26 of the Petition, and what is there said will not be repeated. Neither is it Petitioner's purpose to further discuss the cases of **Hiatt v. San Francisco National Bank**, 361 F. 2d 504, (Ninth Circuit 1966); and **McNellis v. Merchants National Bank and Trust Company**, 390 F. 2d 239, (Second Circuit 1968), cit-

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on Pages 13 to 17 of Respondent's Brief in support of its Point III because these cases were exhaustivly considered in the Petition. It is Petitioner's purpose to discuss under this topical heading only (1) Respondent's self-serving restatement of Petitioner's position on Pages 12 and 13 of its brief; and (2) Respondent's misconception of the holding of the Court in **Meadow Brook National Bank v. Recile**, 302 F. Supp. 62, (E. D. La. 1969).

At Pages 12 and 13 of Respondent's Brief, Respondent first accurately quoted an excerpt from Petitioner's Original Brief in the Fourth Circuit, and then undertook to self-servingly state what was "**thereby agreed.**" What was "**thereby agreed,**" and all that was "**thereby agreed**" was what the Petitioner has always contended and the quoted language clearly indicated, and what Respondent knows Petitioner has always contended, that is, that the procedural statute, West Virginia Code, 47-6-10, deprives a corporate borrower of all relief, either defensive or offensive, under the West Virginia usury penalty statute, West Virginia Code, 47-6-6 — nothing more, nothing less.

Respondent then goes on to self-servingly state Petitioner's contention as being that 12 U.S.C. 85 "**created an exception**" prejudicial to national banks. This is sheer fantasy. Petitioner's briefs and petition in the District Court, in the United States Court of Appeals for the Fourth Circuit, and in this Court can be searched in vain for any such statement or any warranted inference that Petitioner's contention was that 12 U.S.C. 85 "**created an exception**" prejudicial to national banks. Petitioner's contention has been, and still is, as stated in Part III, Petition, Pages 25 and 26, to which the attention of this Court is respectfully invited. Equally unfounded and still more fanciful is the claim made at Page 18 of Respondent's Brief that it is Petitioner's contention that "**discrimination was intended**" against national banks located in West Virginia — apparently by 12 U.S.C. 85.

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In **Meadow Brook**, Supra, United States District Court Judge Heebe was dealing with a Louisiana statute which expressly provided:

> "That the owner of any promissory note, bond or written obligation for the payment of money, to order or bearer or transferable by assignment, shall have the right to collect the whole amount of such promissory notes, bonds or written obligations, notwithstanding such promissory notes, bonds or written obligations may include a greater rate of interest or discount than eight per cent. per annum: provided, such obligation shall not bear more than eight per cent. per annum after their maturities until paid."

In the Opinion at Page 73 District Judge Heebe, referring to 12 U.S.C. 85, said: "**We hold that it is not applicable and that Louisiana law governs.**" Point 26 of the Syllabus reads:

> "Under Louisiana law, there is no limitation as to amount of interest which lender may charge as long as interest is capitalized."

From the foregoing and Footnote 7, itself, it is crystal clear that what is quoted from Footnote 7 on Pages 17 and 18 of Respondent's Brief as if it were an integral part of the Opinion necessary to the decision is avowedly dicta — wholly unnecessary for the decision of the case.

III.

The Claimed Devastating Consequences to National Banks If the Comptroller's Position Is Not Upheld Furnish No Warrant For Failure To Construe and Apply the Federal and State Statutes As Required By the Applicable Rules of Statutory Construction.

This matter of the supposed devastating consequences to national banks in the event the Comptroller's position is u

upheld is raised by Respondent in its Point IV on Pages 19 and and 20 of its brief. The case cited by Respondent in support of this point is **Northway Lanes v. Hackley Union National Bank and Trust Company**, 464 F. 2d 855, (Sixth Circuit 1972). In this case the question before the Court was as to the right of the national bank under 12 U.S.C. 85 to charge for loan expenses in the same manner as was permitted by Michigan law to savings and loan associations — **a practice in which Michigan state banks were not permitted to engage.** The Court, citing and quoting at length, Opinion at Page 862, from **Tiffany v. National Bank of Missouri**, 85 U.S. 409, (1873), sustained the position of the national bank. The Court, Opinion at Page 864, cited and quoted with approval the first paragraph of Section 7.7310 of the Comptroller's Manual For National Banks which appears on Page 19 of Respondent's Brief in this Court, but it is abundantly clear that the Court was following **Tiffany** and approving the referenced paragraph of the Manual because it was provided by **Tiffany** with "**warrant in the record and a reasonable basis in law**." See **Unemployment Compensation Commission v. Aragon**, 329 U.S. 143, (1946), Headnote 6. The second paragraph of Section 7.7310 of the Comptroller's Manual, Petition, Page 3, also quoted on Page 19 of Respondent's Brief, has no such "**warrant in the record and a reasonable basis in law**."

It has been said that hard cases make bad law. The concluding paragraph on Page 20 of Respondent's Brief in this Court relative to the supposed devastating consequences to national banks if the Comptroller's position is not upheld has all the earmarks of an invitation to this Court to make bad law in the instant case. Of course, this Court will uphold or not uphold the position of the Comptroller dependent upon its construction of the federal and state statutes resultant from the application of the pertinent federal and state rules of statutory construction set forth in the Petition at Pages 17 to 23 —

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wholly irrespective of the consequences, devastating or otherwise. The modern tendency has been for the courts to not allow hard cases to make bad law, and, if this was not already more familiar to this Court than to counsel, an almost infinite number and variety of cases, civil and criminal, decided by the courts of last resort of the nation and states, could be cited wherein long standing judicial precedents and administrative rulings have been overturned with the most far-reaching consequences. Accordingly, Petitioner concludes that the supposed devastating consequences will furnish no obstacle to the proper construction by this Court of the federal and state statutes here involved.

CONCLUSION

For the reasons set forth herein and in the Petition the writ of certiorari sought by Petitioner should be granted.

Respectfully submitted,
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